

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

MICHEAL J. DEMIL, an individual;

Plaintiff,

Case No. 2014-001813-CB

vs.

RMD HOLDINGS, LTD; a
Michigan Corporation,

Defendant.

_____ /

OPINION AND ORDER

Plaintiff Michael DeMil has moved to show cause as to why an order compelling Defendant to immediately produce documents pursuant to MCL 450.1487(3) should not be entered at this time. Defendant has filed a response and requests that the motion be denied.

Facts and Procedural History

Plaintiff and his brother, Robert DeMil, are both shareholders of RMD Holdings, LTD (“RMD”). Plaintiff filed his complaint on May 5, 2014 requesting Defendant’s compliance under MCL 450.1487 to provide him with certain documents. Plaintiff requested the documents from Defendant, citing to MCL 450.1487 on February 21, 2014 and March 20, 2014. Defendant filed an answer on May 22, 2014 and has not supplied the documents.

In support of his motion, also filed on May 5, 2014, Plaintiff contends that the documents, under the proper purpose clause of the statute, are reasonably related to his interest as a shareholder in RMD. On May 16, 2014, Defendant filed a response. Defendant contends that Plaintiff’s requests are not in good faith, are contrary to RMD’s best interest, and are statutorily insufficient.

This Court heard oral arguments on May 19, 2014 and ordered the parties to file supplemental briefs by May 27, 2014 that itemized their support for whether each of Plaintiff's requested documents should be produced.

Plaintiff requests the following under MCL 450.1487:

1. Weekly, quarterly and year-end balance sheets for the 2013 fiscal year;
2. The weekly, quarterly and year-end profit and loss statements for the 2013 fiscal year;
3. The quarterly and year-end income statements for the 2013 year;
4. All RMD bank account statements for 2013;
5. All weekly financial reports created by Rob Pietryka in 2013;
6. The 2013 State and Federal Tax Returns for RMD, including all applicable K-1's and schedules;
7. The year end 2013 'percentage completion schedule' for all open RMD projects;
8. A detailed accounts payable and accounts receivable report as of December 2013;
9. Any and all documents reflecting RMD's cash reserves from January 2013 through December 2013;
10. All weekly 'booked and billed' project reports for 2013;
11. All information promised in Rogue Tyson's October 31, 2013 letter but never delivered to date;¹
12. Any and all settlement communications whatsoever, including, but not limited to, letters and emails, between RMD, and the U.S. Department of Justice ("DOJ"), and United States Attorney's Offices, pertaining to projects in New York, Kentucky, Indiana, Illinois, and Georgia under investigation, including, but not limited to any and all emails, letters, offers of settlement and draft and/or final settlement agreements.
13. Any and all settlement communications, including letters and emails, between RMD's attorneys, including but not limited to attorneys Rogue Tyson and Grayson D. Yeargin, and the DOJ and United States Attorney's Offices pertaining to projects in New York, Kentucky, Indiana, Illinois, and Georgia under investigation, including, but not limited to any and all emails, letters, offers of settlement and draft and/or final settlement agreements.
14. Any and all financial information transmitted by whatever means to the DOJ and/or United States Attorney's Offices by RMD and/or its attorneys for the purpose of the DOJ's evaluation of RMD's financial condition in connection with the DOJ's active investigations related to the above-referenced projects.

See Plaintiff's Motion at 2-3; Plaintiff's Motion, Exhibits A, B.

¹ This includes: an RMD balance sheet of assets and liabilities, a year to date income statement, comprising revenues, direct and indirect costs of sales, gross profit, operating expenses and other income and expenses. *See* Plaintiff's Supplemental Brief at 11.

Standard of Review

Before a court may issue an order to show cause, there must be an adequate “foundation of competent evidence” demonstrated from which “legitimate inferences” are deduced to establish its purpose. *Hunt v Green Lake Twp*, unpublished opinion per curiam of the Court of Appeals, issued May 21, 2009 (Docket No. 283524) (citing *In re Contempt of Calcutt*, 184 Mich App 749, 757; 458 NW2d 919 (1990)). With regard to orders compelling discovery, as Plaintiff’s motion requests, courts acknowledge the relevance of the discovery and the opposing party’s interest in denying production. *Cabrera v Ekema*, 265 Mich App 402, 407; 695 NW2d 78 (2005) (citing *In re Hammond Estate*, 215 Mich App 379, 386; 547 NW2d 36 (1996); *see also* MCR 2.302(B)(1)).

With regard to enforcement of a right created by a statute, such as the right for a shareholder to inspect corporate books and records created by MCL 450.1487, the Court of Appeals has clarified that review of this issue poses an analysis similar to that of obtaining a writ for mandamus. *North Oakland Co Bd of Realtors v Realcomp, Inc*, 226 Mich App 54, 54; 572 NW2d 240 (1997). As such, the requesting party “must have a clear legal right to the performance of the specific duty sought to be compelled, and the [opposing party] must have a clear legal duty to perform the same.” *Id.* Additionally, the standard of review for this type of issue allows discretion in compelling the opposing party’s performance in line with the statute, but is not a standard “to compel its exercise in a particular manner.” *Id.* (citing *Teasel v Dept of Mental Health*, 419 Mich 390, 409-10; 355 NW2d 75 (1984)).

Analysis

MCL 450.1487(1) provides that a corporate shareholder may request in writing the corporation’s “balance sheet at the end of the preceding fiscal year,” “statement of income for

the fiscal year,” and “statement of source and application of funds for the fiscal year.” Additionally, a shareholder, through his or her attorney, can request “the corporation’s stock ledger, a list of its shareholders, and its other books and records, if the shareholder gives the corporation written demand describing with reasonable particularity his or her purpose and the records he or she desires to inspect, and the records sought are directly connected with the purpose.” 450.1487(2).

Under the statute a proper purpose is a purpose that is *reasonably related* to the requesting party’s interest as a shareholder in the corporation. *Id.* (emphasis added). The requesting party is entitled to a court order compelling discovery if the corporation has not complied within five business days and all the necessary preconditions are met. 450.1487(3). If the requesting party has successfully demonstrated its proofs to the reviewing court, the burden is upon the opposing party to demonstrate that the request is founded upon an improper purpose or that the records sought are “not directly connected with the person’s purpose.” *Id.*

The Court of Appeals has defined “proper purpose” as a purpose that is in “good faith,” seeks information bearing upon protection of the shareholder’s interest and that of other shareholders in the corporation, and is not contrary to the corporation’s interests. *North Oakland Co Bd of Realtors, supra* at 56 (recognizing that “inspection requests to satisfy idle curiosity or aid a blackmailer” are not proper purposes under the statute (citing *Slay v Polonia Publishing Co*, 249 Mich 609, 613; 229 NW 434 (1930))). Accordingly, in this case, Plaintiff must prove with competent evidence and legitimate inferences that his interests as a shareholder are reasonably represented by his requests in order to satisfy the proper purpose clause of MCL 450.1487 and establish entitlement to the documents.² The Court of Appeals has viewed

² Plaintiff has already met predicate requirements of the statute discussing written requests for documents. *See* Plaintiff’s Motion, Exhibits A, B.

shareholder interests to typically consist of “voting at shareholder meetings, electing directors, adopting bylaws, amending charters, *examining corporate books*, and receiving corporate dividends.” *Franchino v Franchino*, 263 Mich App 172, 184; 687 NW2d 620 (2004) (emphasis added).

In his motion and complaint, Plaintiff first requests to inspect the RMD 2013 balance sheets, profit loss statements, and income statements. Both parties concede that they are directly included in the statute’s purview. Plaintiff additionally supports that his desire in inspecting these documents is to ascertain current and future profitability of his RMD investments and the financial state of RMD. Both represent Plaintiff’s interest as a shareholder and the value of that interest. Defendant argues that Plaintiff is a sole market competitor against RMD and delivery of the requested information would grant Plaintiff an unfair advantage in sub-contract bidding for cable, guardrail, and fencing projects and would, therefore, be contrary to RMD’s interest under *North Oakland Co Bd*. However, Plaintiff argues that RMD has attempted to run Fenton Excavating & Construction, Inc. (“Fenton”), another corporation with whom Plaintiff is currently associated and who is also a subject in Defendant’s contention, out of business. Plaintiff argues that the animosity between the parties is personal rather than market competitive. Resultantly, Defendant’s contention does not convert Plaintiff’s purpose as improper, like an idle curiosity or blackmail would. Thus, Plaintiff’s purpose has not been proven to be improper. Release of the information is not severe enough to constitute unfair market competition where neither party recognizes that other corporations compete in the industry besides RMD and Fenton. Consequently, Plaintiff has established proper purpose and entitlement to review the requested documents under the statute.

Moreover, and with specific regard to reasonable relationships between shareholder interests and requests to establish a proper purpose under the statute, the Court of Appeals has held in constitutional cases that reasonable relationships between the remedies sought and legitimate purposes in requesting them are based upon facts known and facts reasonably assumed to establish a connection. *See Ullery v Sobie*, 196 Mich App 76, 80; 492 NW2d 739 (1992) (citing *Ludington & NR Co v Epworth Assembly*, 188 Mich App 25, 43-44; 468 NW2d 884 (1991)); *see also Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 177; 667 NW2d 93 (2003). Because a reasonable relationship exists or can be assumed between a shareholder's interests in a corporation and legitimate requests for review of its financial documents, Defendant furthermore, has not demonstrated that Plaintiff's requests under MCL 450.1487 are improper.

With regard to listed items four through eleven, the parties adopt similar positions, except Defendant states that several are not explicitly in the statute. Plaintiff argues that these items fall under the statute through "other books and records." *See* MCL 450.1487(2)-(3). Plaintiff contends that the requested documents contain statements pertinent to finance. Plaintiff presumes that these documents are encapsulated in the "other books and records" language of the statute following the specific finance-oriented terms in the preceding language. The *ejusdem generis* rule of statutory interpretation allows a general term that either precedes or follows listed items to be limited by their definitions and classifications. *See generally People v Smith*, 393 Mich 432, 436; 225 NW2d 165 (1975); *see also Brown v Farm Bureau Gen Ins Co of Michigan*, 273 Mich App 658, 662; 730 NW2d 518 (2007). Because items four through eleven are within the same general category of terms pertaining to finance as "balance sheet at the end of the preceding fiscal year;" "statement of income for the fiscal year;" "statement of source and

application of funds for the fiscal year;” “the corporation’s stock ledger;” and “a list of its shareholders,” they fall under MCL 450.1487 by the *ejusdem generis* rule. See MCL 450.1487(1)-(2); see also *Melia v Employment Security Comm*, 346 Mich 544, 562; 78 NW2d 273 (1956) (recognizing that statutes should be read in their entirety and all sections should be understood consistently to not render other parts “nugatory”).

With regard to items twelve through fourteen referring to the DOJ, Defendant contends that Plaintiff has an adversarial position against Defendant in the negotiations with the DOJ, there is no proper purpose in allowing inspection of the material, and these items fall outside of the statute. Plaintiff incorporates the above reasoning to provide that they do fall under the statute. Plaintiff further defines his proper purpose in requesting these items by demonstrating a reasonable relationship between the granted remedy, view of the documents, and the legitimate proffered purpose for review. That is, Plaintiff has not had access to RMD negotiations, communications, and financial disclosure exchanges with the DOJ for settlement and is to be a source for one third of the settlement funds to that settlement. Plaintiff argues that he cannot make an educated decision without view of this information. Settlement discussions and financial information conveyed to the DOJ by RMD reveal RMD’s financial status and the value of Plaintiff’s shareholder interest. Reasons that were applied to items four through eleven, regarding the (1) *ejusdem generis* rule, (2) reasonable connections between the request and remedy that relate to the shareholder’s interest, and (3) Defendant’s failure to establish Plaintiff’s purpose as improper, similarly support that Plaintiff has demonstrated a proper purpose and is entitled to view items twelve through fourteen.

Conclusion

Based upon the reasons set forth above, Plaintiff is entitled to view the requested documents under MCL 450.1487, and therefore, his motion to show cause is GRANTED. Defendant must provide access to the documents within fourteen days. Pursuant to MCR 2.602(A)(3), this Opinion and Order neither resolves the last remaining issues nor closes this case.

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: November 12, 2014

JCF/sr

Cc: *via e-mail only*
Benjamin J. Aloia, Attorney at Law, aloia@aloiaandassociates.com
Rogue Tyson, Attorney at Law, rtyson@nationwidecos.com